(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

George Greeley, Kim Elizabeth,
George Nicholas, Nyssa Gale: Bryant
Petitioners

v.

Waltham School Committee,
Associate Justice Margaret S. Fearey,
Respondents

On petition for a Writ of Certiorari to
Massachusetts Supreme Judicial Court,

Petition for Writ of Certiorari

George Greeley: Bryant,
Kim Elizabeth: Bryant,

Mail location:
Attention: Joseph Adams
Friends of the Constitution
Post Office Box 620115
Newton Lower Falls, Massachusetts

8501

Questions Presented for Review

Question 1. Where the republican frame of government prohibits the actions of government officers from being repugnant and Contrary to the Declaration of Rights of the Inhabitants contained in the Massachusetts Constitution, may government officers act in such manner to enforce a claimed "compelling state interest" absent Constitutional and statutory authority, and in violation of the unalienable rights of the Inhabitants to:

a) freely profess and exercise their religion per the Massachusetts Constitution, Part I, Article II;
b) refuse enjoinder of attendance upon the instructions of public teachers if there be none upon which they may conscientiously and conveniently attend per Massachusetts Constitution, Part I, Article III;
c) be fully informed of the Charges against and meet the witnesses against them face to face, them per Massachusetts Constitution, Part I, Article XII;
d) be controulable only by law and not opinion per Massachusetts Constitution, Part I, Article X, and to require that the Judicial Department may not exercise the authorities of the Legislative per Massachusetts Constitution, Part I, Article XXX
e) be fully heard in his defence by himself, or his council, at his election per Massachusetts Constitution, Part I, Article XII;
f) not be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges or put out of protection of law without jury of peers per Massachusetts Constitution, Part I, Article XII;
g) enjoy and defend their lives and liberties, including the liberty to rear their children and to seek their safety and happiness per Massachusetts Constitution, Part I, Article I
h) not be compelled to produce evidence per Article XII

i) be free from unreasonable search and seizure of person, papers and all possessions without warrant issued upon foundation supported by oath or affirmation per Massachusetts Constitution, Part I, Article XIV?

Question 2. Where the Alaska Statute, AS 14.30.010 stands as evidence of a codification of law that protects these natural and unalienable rights, may government officers ignore the same in order to support their claim of a "compelling state interest" and thus derogate the Massachusetts Constitution?

List of Parties

The names of all parties are listed in the caption of this case and no parent companies or nonwholly owned subsidiaries are known to the Petitioners.

Table of Contents

Questions Presented for Review ..... **i**
List of Parties ..... **iii**
Table of Contents ..... **iv**
Table of Cited Authorities ..... **v**
Jurisdiction **1**
Constitutional Provisions, and Statues **2**
Statement of the Case **2**
Argument in Support of a Grant of this Writ **7**
Appendix A **14**
CARE AND PROTECTION OF BERT & another. 14
NOTICE OF DENIAL OF PETITION FOR REHEARING 16
Appendix B **17**
IN RE: CARE AND PROTECTION 17
Appendix C **22**
FINDINGS OF FACT AND CONCLUSIONS OF LAW 22
I. Procedural History 22
II. Facts 25
III. Conclusions of Law 36
Appendix D **52**
Massachusetts G. L. 119:24. 56
AFFIDAVIT OF PAMELA FINLEY 58
Appendix E. **61**
Petition to Vacate 61

Table of Cited Authorities

Constitutional Provisions

Massachusetts Constitution, Part I, Article I ..... i, 2, 53
Massachusetts Constitution, Part I, Article II ..... i, 2, 53
Massachusetts Constitution, Part I, Article III ..... i, 2, 55
Massachusetts Constitution, Part I, Article VII 11, 20
Massachusetts Constitution, Part I, Article X ..... i, 2
Massachusetts Constitution, Part I, Article XII ..... i, 2, 66
Massachusetts Constitution, Part I, Article XIVii, 54, 69, 71
Massachusetts Constitution, Part I, Article XX 72
Massachusetts Constitution, Part I, Article XXX ... i, 2, 20
Massachusetts Constitution, part II, chapter. 5, § 219, 37, 69, 70
Massachusetts Constitution, Part the Second, Chapter I, Section I, Article IV 62, 67
Massachusetts Constitution, Preamble 11, 52, 76
united States Constitution Fourteenth Amendment42, 66
united States Constitution Fourth Amendment..... 66
united States Constitution, Article IV, section 4.... 1, 2, 11
united States Constitution, First Amendment 66
united States Constitution, Ninth Amendment..... 1, 2, 8
united States Constitution, Tenth Amendment..... 1, 2, 8

Statutes

Alaska Statute, AS 14.30.010 ..... ii, 5, 7
Massachusetts General Law c. 119 §1 36
Massachusetts General Law c. 119 §29 23
Massachusetts General Law c. 119 §51A 30
Massachusetts General Law c. 119 §51B 30
Massachusetts General Law C. 211, § 3 ..... 17, 18, 21
Massachusetts General Law c. 76 §2 ..... 27, 40, 43, 72
Massachusetts General Law c. 76, § 1 ..... passim
Massachusetts General Laws, Chapter 119, § 24 passim
Massachusetts General.Laws. Chapter 76 3
Massachusetts General.Laws. chapter. 211, section 3 6
Massachusetts.General.Law. Chapter 119, section 51A 3
Petitions of the New England Home for little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631 (1975) 38, 39

Cases

Adoption of Carlos, 413 Mass. 339 (1992) 39
Adoption of Iris, 43 Mass. App. Ct. 95 (1997) 38
Adoption of Mary, 414 Mass. 705 (1993) 39
Attorney General v. Bailey, 386 Mass. 367(1982) 45
Bezio v. *Patenaude,* 381 Mass. 563 (1980) 39
Callahan v. Westinghouse Broadcasting Co., Inc., 372 Mass. 582 (1977) 38
Care and Protection of Charles, 399 Mass. 324 (1987) ..... passim
Custody of a Minor, 389 Mass 755 (1983) 40
Dunbrack V. Commonwealth, 398 Mass. 502, (1986) 18
McDuffy, et al. v. Secretary of the Executive Office of Education, et al., 415 Mass. 545 (1993) 37
Newell v. Homer, 120 Mass. 277 (1876) 38
Parents of Two Minors V. Bristol Division of the Juvenile Court Dept, 397 Mass. 846 (1986) 18
Petition of the Committee of Public Welfare to Dispense

with Consent to Adoption, 383 Mass. 573 (1981) 39, 40
Pierce v. Society of Sisters, 268 U S. 510 (1925)..... 40
Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701 (1990) 18
Richards v. Forrest, 278 Mass 547 (1932)..... 40
Santosky v. Kramer, 455 U.S. 745 (1982)..... 40
Stone v. Essex County Newspapers, Inc., 367 Mass. 849 (1975) 38
Wisconsin v. Yoder, 406 U.S. 205, (1972)..... 19, 40

Citations of the Reports of the Opinions and orders

The Opinion of the Massachusetts Supreme Judicial Court upon review of this matter appears at Appendix A to this petition and is reported at 429 Mass. 1001 (1999) as: "CARE AND PROTECTION OF BERT & another"

The Opinion of the Massachusetts Supreme Judicial Court, Single Justice Session upon review of this matter appears at Appendix B to this petition and is unpublished

The Findings of Fact and Conclusions of Law of the Waltham District Court appears at appendix C to this petition and is unpublished.

Jurisdiction

This Petition seeks to review the adjudication and order of Associate Justice Fearey issued on July 31, 1998 in Care and Protection of Bryant matter; the judgement of Supreme Judicial Court Justice Ireland, on Petition for Judicial Review affirming the original adjudication and order on December 2, 1998; and the judgement of the full Massachusetts Supreme Judicial Court under further appellate review ruling Judgement affirmed on February 12, 1998. The Massachusetts SJC "Petition for Rehearing" denied on March 26, 1999.

The jurisdiction of the Court is invoked under the united States Constitution, Ninth and Tenth Amendments, and Article IV, section 4

Constitutional Provisions, and Statues

The Constitution of the Commonwealth of Massachusetts Part the First, Preamble, Article I, Article II, Article III, Article X, Article XII, and Article XXX and others are involved in this case. Pertinent parts of these are included in Appendix D.

Massachusetts General Laws, Chapter 119, §24, the full text of this is included in Appendix D

Alaska Statute AS 14.30.010 the full text of this is in Appendix D.

United States Constitution provisions involved in this case:

a) Ninth Amendment "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the People."
b) Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
c) Article IV, section 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion;. . ."

Statement of the Case

George Nicholas and Nyssa Gale are the children of George Greeley and Kim Elizabeth. The Waltham School Committee and its agents have no evidence of enrollment of either George Nicholas or Nyssa Gale in any of the Waltham government schools.

Mr. Daniel Doyle holds the statutorily created office of Supervisor of Attendance and Census for the Waltham School Department. Mr Doyle stated that in October, 1996, "...Mr. Barry, the principal at the Fitzgerald, told me that he had received an anonymous phone call alleging that a gentleman by the name of Mr. Bryant had two school-aged children who were not attending school." Mr. Doyle telephoned the family and on November 8, 1998 spoke with Kim Elizabeth where "Mrs. Engler, in our initial conversation, was quite clear that she had no intention of cooperating in any way unless I could produce a law or number of laws that said that she -- that said she had to."

On November 8, 1996, Mr. Doyle sent a form letter for the parents to fill out and a copy of the Waltham Policy and Procedures regarding homeschooling, but did not send the required law. When the Parents' reply again demanded law, Mr. Doyle initiated a criminal complaint in Waltham District Court, pursuant to Massachusetts General Laws. Chapter 76 for "failure to send child to school. Failure to send child to school or provide proper schooling."

The Parents appeared in court in January 1997 and again requested proof of authority for Mr. Doyle's actions in the form of law. Mr. Doyle then filed allegations of "educational neglect" with the Department of Social Services (DSS) pursuant to Massachusetts General Law, Chapter 119, section 51A. The DSS found the allegations of "educational neglect" unsupported and dismissed the matter in June 1997. The charges of "failure to send" were first changed from criminal to civil, and then dismissed upon request of the Commonwealth, with prejudice.

On or about June 2, 1997, Mr. Doyle submitted an affidavit in support of a Care and Protection Petition, alleging that "Ms. Engler and Mr. Bryant are unwilling to cooperate or provide information that their children have received, are receiving or will receive the necessary and proper educational care." The record is not clear as to whether Mr. Doyle or the Waltham School Committee is the Petitioner in the Care and Protection matter.

In October, 1997 Attorney Lorie Kram was appointed as Court Investigator in the matter and issued a report stating that:

> "By way of information for the Court, the 'learner-led' approach is a well-established avenue of education within homeschooling literature. This ideology also serves as the basis for various alternative schools throughout the world. Two schools that utilize this type of ideology are Summerhill in England and Sudbury Valley Day School in Massachusetts.
>
> "Because of their educational ideology, the Engler/Bryant family does not intend to submit their children to standardized testing. The parents also believe that the children's work product is their own private property and is not to be made available for school personnel. Because the family believes in the 'learner-lead' approach, they are not able to assess the children's grade level, rather, they have utilized materials presented by the Waltham School district to indicate the areas of interest their children have explored...."

The Attorney for the Parents, Attorney Hession, submitted a Motion for More Definite Statement/Bill of

Particulars prior to the start of trial to require the Waltham School Committee to fully disclose the charge against the Parents. This motion was denied by the District Court. Neither the Waltham School Committee, nor Mr. Doyle have alleged any conditions set forth in law upon which a Care and Protection petition may be brought. The Waltham School Committee presented no evidence that the Parents have failed in their duty to rear their children appropriately.

The Parents gave several written assurances to Waltham of their desire to obey law, and demanded on several occasions that Waltham produce the statutes or Constitutional provisions that requires parents to produce information, or any other law to which Parents need conform. In response, Waltham did not produce any statute or Constitutional provision, which gave it specific authority to require the parents to provide information to the Waltham School Committee.

A trial was conducted in three court appearances over six months, January 21, April 3, and July 10, 1998. Associate Justice Fearey presiding, issued her FINDINGS OF FACT AND CONCLUSIONS OF LAW on 31 July 1998. During all proceedings to date, the Parents have been denied Council for their assistance. No jury was permitted to determine the facts or the law.

Expert testimony showed that children educated in their family are generally afforded a better education than those attending government schools. Expert testimony showed that assignment to grade level, grading and testing are not essential in order to rear children. Evidence showed that no "compelling interest" may support such intrusion (See AS 14.30.010)
The Court found that the burden of proof in this matter

is upon the Parents. The Court found that the Parents did not fulfill the requirements set fourth in a Massachusetts Court Opinion. The Court ordered that the Parents, as penalty, must rear their children in the manner dictated by the Waltham School Committee or surrender the children to the Department of Social Service.

The Parents petitioned a single justice of the Massachusetts Supreme Judicial court for judicial review. On or about December 2, 1998, Justice Ireland denied Parents' petition pursuant to Massachusetts General Laws. chapter. 211, section 3 (SJC 98-520) On or about February 12, 1999 the Supreme Judicial Court affirmed Justice Ireland's decision of December 2, 1998.

On October 7, 1998 and other Dates, Associate Justice Fearey issued temporary custody orders committing the children to the Department of Social Services. Associate Justice Fearey recused herself from this case on December 2, 1998.

The matter in the lower court is currently being heard by Associate Justice Garinger. Associate Justice Garinger ordered testing of the children which the Parents provided under severe threat of harm to the Children. On March 3, 1999, Associate Justice Garinger returned custody of the Children to their parents. The next review date for the proceedings is scheduled for June 30, 1999.

As the Emergency petition to the single Justice of the Supreme Judicial Court was not ruled on for three months, The Parents appealed the first temporary custody order, dated 7 October, 1998 to the

Massachusetts Appellate Court so as not to loose their right to do so. A hearing on the Appeal was conducted on May 14, 1999. The Massachusetts Judicial Court denied direct appellate review of this Appeal.

Alaska Statute AS 14.30.010 was entered into evidence during the trial in the Waltham District Court . Issues regarding the Constitutionality of the actions of the Waltham School Committee and its agents were raised prior to, during and after the proceedings and are primarily listed within the Petition to Vacate in Appendix E.

These issues were incorporated by reference within the Petition for Judicial Review and its addendum and within the Request for further review and for Reconsideration to the Massachusetts Supreme Judicial Court.

The Courts have passed on these issues by claiming that the issues have been long settled by the State's compelling interest in "ensuring the education of its citizens", an interest not supported by Law.

Argument in Support of a Grant of this Writ

This matter brings to light a conflict between the unalienable rights and liberties of Parents protected by the Constitution of the Commonwealth of Massachusetts and a claim by government agents of a "compelling state interest" that authorizes these agents to act in a manner repugnant and contrary to the Constitution. The Parents in this matter have studied the law and find that no such authority can exist in our form of government. The Parents have demanded

evidence of the existence of the authority claimed in the form of Constitutional provision or statute but none is in evidence. Therefore, the Parents bound by their solemn compact with the whole people have acted to enforce the provisions of the Constitution, and have been put out of the protection of Law for so doing.

Under the united States Constitution, Tenth Amendment, the People reserve powers not delegated to the united States nor prohibited by the Constitution. Thus the People have retained the unalienable right to seek justice in any court of law to which the People give jurisdiction to hear such matter. This unalienable right may not be denied nor disparaged per the united States Constitution, Ninth Amendment

The Waltham School Committee, by expending the funds of these united States and the funds of the Commonwealth, has made itself part of government. The Waltham School Committee as the Accuser, and various Courts named in this matter are government agents and possess no rights, only those authorities, duties and powers assigned them by the People. As government agents, they may not deny the People's unalienable right to defend their lives and liberties in this matter by denying or disparaging the People's right to demand justice and to enforce their Law in this court of supreme authority in these united States.

This case presents an issue of fundamental importance to the administration of justice in the courts of the united States. The issue deals with the constitutional limits on government authority , power, and of the protection of the natural and unalienable rights of the People. The government actors having no power except that provided by the Constitution cannot claim a

"compelling state interest" so as to render the various provisions of the declaration of rights of the Inhabitants inoperative.

Because Care and Protection petitions are promalgated to remove children from their parents, because government schools are dangerous, harmful and ineffective for some children, because more and more families are choosing to return to the primacy of parental roles in child rearing and parents are treated like obstructionists when their actions to ensure the best interests of their own children conflict with the opinions of governmental "authorities," it is essential that this Court settle these questions at the earliest juncture. This decision if allowed to stand, may spawn generations of children harmed by care and protection proceedings and separated from their parents due to differing religious beliefs and pedagogy. The effect of this decision is to "standardize" all children, for any parent refusing to administer a standardized test to his child currently may be found unfit and the children may be removed for this cause alone.

Thomas Jefferson, our third president, once stated:

> "Is it a right or a duty in society to take care of their infant members, in opposition to the will of their parents? How far does this right and duty extend? [T]o guard the life of the infant, his property, his instruction, his morals? The Roman Father was supreme in all these; we draw the line: but where? Public sentiment does not seem to have traced it precisely. Nor is it necessary in the present case. It is better to tolerate the rare instance of a parent refusing to let his child be educated, than to shock the common feelings and idea by the public

asportation and education of the infant against the will of the father." [1]

The instant case is just this, a matter where the public asportation of two children has occurred for the purpose of educating the children against the will of the father. This government abduction has occurred not because the Parents refused to let their children be educated, but because the Parents exercised their unalienable rights to demand proof of authority, the law, in order to protect the children from persons claiming to act as government agents. This government abduction has occurred because the Parents maintain their religious belief that it is their unalienable right and duty before the Creator to rear their offspring. This government abduction has occurred because the Bryant Family has been put out of protection of the law.

The evidentiary standard in this matter has placed the burden of proof squarely on the Parents to produce evidence that the children are enrolled in school, or "approved" by the local school district. Such action is unlawful per the Massachusetts and United States Constitution. The government of Massachusetts has no authority to declare all parents unfit and accountable to government officers and to enforce such action to the effect that Parents have no liberty to care for and protect their own offspring in accordance with their conscience and religious beliefs. Such action has made

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[1] Morgan, Kerry L. Real Choice Real Freedom in American Education, University Press of America, New York, 1997. P 106. In the endnotes accompanying this quotation, Attorney Morgan notes that "As used by Jefferson, the 'public asportation and education of the infant against the will of the father,' means the wrongful or felonious removal of a child from his or her parent by the state."

the Bryant Family slaves of the Waltham School Committee and made a mockery of the Constitution.

Our republican government is instituted for the protection, safety, prosperity and happiness of the People so that they may enjoy their natural rights and the blessings of life (Massachusetts Constitution, Preamble). Whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or abolish it. (Massachusetts Constitution, Part I, Article VII)

The Petitioners of this writ, cognizant of the long train of abuse and usurpation of the Rights of the People by persons claiming to act as government agents, have a right and a duty to seek justice in this Court so as to prudently avoid the necessity of the People needing to throw off their current government and institute a new one within the Commonwealth of Massachusetts. The actions of the Waltham School Committee and its agents and the Massachusetts Courts as they stand mean that the Declaration of Rights of the Inhabitants clearly stated in the Constitution of Massachusetts has no effect.

Further, this Court has jurisdiction over this matter pursuant to the united States Constitution, Article IV, section 4. The Respondents, as government agents, have failed to support the frame of Government agreed upon, ordained and established by the Inhabitants in the Constitution of the Commonwealth of Massachusetts and have thus denied the republican form of government required by this Article of the United States constitution. The Petitioners, Inhabitants of Massachusetts, look to the united States to guarantee the republican form of government, for the

Inhabitants have suffered an invasion of oppression and tyranny under the actions of the Respondents.

The Parents in this case demanded proof of authority and demanded law in evidence so that they may understand the nature of the charges they are being held to answer for and in order to have knowledge of the proceedings against them. They have demanded the assistance of Council at all proceedings, and have demanded due process and the protection of law. These demands are their unalienable rights to which the laws of Nature and of Nature's God entitle them.

By the Court's decision, parents have been made powerless to effect the education of their offspring and children have become "mere creatures of the state".

That this intrusion is unlawful is clear from the statute of the State of Alaska. Where families in Alaska may rear their children without providing names, birthdates, education plans, grading, test results, progress reports, portfolio materials, or any other information, data, papers or possessions, no "compelling state interest" to supply this may be supported in Massachusetts. The inhabitants of the state of Alaska may not have more natural, essential and unalienable rights than those of the Commonwealth of Massachusetts as these rights are fixed and unchangeable per the Great Legislator of the Universe.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted this 24th day of June, 1999 by our hands,

George Greeley: Bryant

Kim Elizabeth: Bryant

Mail location:

Attention: Joseph Adams
Friends of the Constitution
Post Office Box 620115
Newton Lower Falls, Massachusetts

Appendix A

SJC-07912

CARE AND PROTECTION OF BERT & another.

February 12, 1999.

Supreme Judicial Court, Appeal from order of single justice.

The parents of two children purport to appeal pursuant to S. J. C. Rule 2:21, 421 Mass. 1303 (1995), from the denial of their petition for relief by a single justice of this court. The trial judge had ordered the parents to take certain action regarding the education of the children and specified that, if the parents had not fully complied by a certain date, temporary custody of the children would be transferred to the Department of Social Services.

We treat that order as interlocutory for purposes of rule 2:21 (1), and turn to the requirement in rule 2:21 (2) that "the appellant must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means." The only statement which could be read as bearing on this question, "the nature of care and protection proceedings is to put forth numerous 'temporary'

commitment orders that are possibly unappealable until the children are permanently, finally, removed from the custody of their parents at great harm," is weakened by the fact that the parents have filed a notice of appeal in the underlying proceeding, from an October 7, 1998, order and have filed an application for direct appellate review thereof. Moreover, they do not state whether the order at issue comes within the scope of G. L. c. 119, § 27, which pertains to appeals.

Judgement affirmed

The case was submitted on the papers filed, accompanied by a memorandum of law.

The parents, pro se.

Kristyn Snyer for the children.

Jeannette A. McCarthy for Waltham School Department.

Cheryl A. Watson for Department of Social Services.

Susan Mojica, amicus curiae.

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Father of Minor Children
P.O. Box 620115
Newton Lower Falls, MA 02462

RE: No. SJC-07912

CARE AND PROTECTION OF BERT & another

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Jean M. Kennett, Clerk

Dated: March 26, 1999

To: Father of Minor Children
Thomas F. Reilly, Attorney General
Kristyn Snyer, Esquire
Jeannette A. McCarthy, Esquire
Cheryl A. Watson, Esquire
S. J. C. for Suffolk County

Appendix B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-98-0520

IN RE: CARE AND PROTECTION

MEMORANDUM AND ORDER

The parents of two children, G. and N. (collectively "the children"), who are the subjects of the underlying care and protection proceeding, filed a petition pursuant to G. L. C. 211, § 3, for relief from an order by a judge in the Waltham District Court (Feary, J.) issued on July 31, 1998. The order authorized the transfer of temporary custody to the Department of Social Services (the "Department") if the parents failed to follow certain home schooling requirements for their children or to enroll the children in the Waltham public schools or approved private school by September 8, 1998. This order has been stayed until December 2, 1998, pending review by this Court

I briefly summarize the relevant facts from the judge's Findings of Fact and Conclusions of Law. In October 1996, Daniel Doyle, an attendance supervisor for the Waltham Public Schools, was informed by an elementary school principal that the children were not enrolled in school. After an initial investigation Mr. Doyle was informed by the mother of the children that she intended to educate the children at home. Despite the mother's initial resistance to Mr. Doyle's inquiry, the parties thereafter engaged in a protracted effort to

resolve this matter. After numerous meetings and exchanges of information, such as lists of curricular materials and samples of educational activities, the chief impediment to a resolution of the matter centered around the parents' refusal to permit an assessment and standardized testing of the educational level and progress of the children. Further, the parents did not file a sufficiently detailed home schooling plan to allow the school committee to chart the children's educational level and progress. Following the July 31 order, the parents filed their petition pursuant to G. L. c. 211, § 3, seeking a dismissal of the matter below.

General Laws c. 211, § 3, provides general superintendence over courts of inferior jurisdiction to "prevent errors and abuses." A party filing a petition pursuant to c. 211, § 3, must demonstrate both a substantial claim of violation of substantive rights and error that cannot be remedied through the ordinary review process. Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990). The discretionary power of review under c. 211, § 3, is exercised in only the most exceptional circumstances. Id.

Initially, I must determine whether the petition tiled under G. L. c. 211, § 3, is properly before me. On the issue presented, the parents have exhausted their remedies and have alleged a substantial violation of a substantive right. The parents have satisfied the threshold requirement for review. See Dunbrack V. Commonwealth, 398 Mass. 502, 504 (1986); see also Parents of Two Minors V. Bristol Division of the Juvenile Court Dept, 397 Mass. 846, 849 (1986). I proceed to the merits of the petition.

This case presents a clash between the fundamental right of parents to raise and educate their children and the Commonwealth's compelling and substantial interest in providing for the education of children. The United States Supreme Court has clearly stated that child rearing and education are liberty interests protected by the Fourteenth Amendment and that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Likewise, the parents' right to educate their children "must be reconciled with the Substantial State interest in the education of its citizenry." Care and Protection of Charles, 399 Mass. 324, 334 (1987). Nonetheless, the "State's interest in universal compulsory education . . . is by no means absolute to the exclusion or subordination of all other interests." Wisconsin V. Yoder, supra at 215.

From its infancy, the Commonwealth imposed a duty upon "Legislatures and Magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and sciences . . . especially public schools and grammar schools in the towns." Massachusetts Constitution, part II, c. 5, § 2. The codification of that duty is found in G. L. c. 76, § 1, which requires that "[e]very child between the minimum and maximum ages established for school attendance by the board of education attend a public day school in [the] town [where the child resides] or some other day school approved by the school committee" unless the child is "otherwise instructed in a manner approved in advance by the superintendent or the school committee." In the instant case, there is no dispute that the children neither attend a public school or other day school

where they reside.[2] Further, the children do not receive alternative instruction with the advanced approval of the school district.

In the Findings of Fact and Conclusion of Law, the trial judge ordered, absent the submission of an educational plan to the school committee by the parents and an agreement to a professional evaluation of each child's educational level and cognitive development, that temporary custody of the children would transfer to the Department. To date, there has been no compliance with the order by the parents. The parents assert that the trial judge's order is violative of their rights under Articles XII and XXX of the Massachusetts Declaration of Rights and, as such, is unconstitutional. The constitutionality of the judge's order is well settled. The seminal case in Massachusetts is Care and Protection of Charles, supra. There, the Court held that C. L. c. 76, § 1, is applicable to proceedings under C. L. c. 119, § 1. Further, the Court concluded that c. 76, § 1, is "neither void for vagueness nor an unlawful delegation of legislative authority." Id. at 330.

It is important to note that the Court in Charles agreed with the trial judge that the children were in need of care and protection with respect to their educational care. The Court further found that care and protection "was warranted on the evidence" and cited as one

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[2] At the hearing on the subject petition, the parents discussed the possibility that the children would move to Connecticut. There was a general discussion about the presentation of documents to the lower court as proof of the new residence. The possibility of a change in residency raised the issue of mootness and delayed the disposition of this matter. To date, I am not aware of any documents evidencing a change of address to Connecticut.

example the parents' refusal to permit testing of their children. Care and Protection of Charles, supra at 340. Because the parties in Charles "never confronted the issues before them in light of the legal principles and guidelines set out in [the] opinion," the Court vacated the judge's order and remanded the case to allow the parties to make a serious effort to resolve the matter by agreement. Id. The parties here, however, have had the benefit of Charles and a remand for additional discussions would only serve to delay this case further and would possibly jeopardize the educational progress of the children.

The trial judge in this case displayed a respectful regard for the rights of the parties; a willingness to work toward a resolution of the issues; and a careful consideration of the applicable law. The trial judge has committed no error of law or abuse of discretion. The petition pursuant to G. L. c. 211, § 3, is denied.

By the Court,

S/Roderick L. Ireland
Associate Justice

Entered: December 2, 1998

Appendix C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss WALTHAM DISTRICT COURT
Docket No. 9751-CP-10

Care & Protection of	)
George Nicholas Bryant &	)
Nyssa Gale Bryant	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the court pursuant to the filing of a petition ("Petition") alleging that George Nicholas Bryant, d.o.b. 2/16/88 ("George") and Nyssa Gale Bryant, d.o.b. 10/26/89 ("Nyssa") (collectively, the "Children"), are in need of care and protection pursuant to G.L. c. 119, § 24, *et seq.*, and praying that this court so adjudicate them. Having received evidence and heard arguments of counsel, this court adjudicates George and Nyssa to be in need of care and protection and enters further orders as set forth *infra*. In furtherance thereof, this court issues the following findings of fact, conclusions of law and order.

I. Procedural History

1. The Petition was filed on June 2, 1997, by Daniel Doyle ("Mr. Doyle"), the attendance officer of the Waltham School Committee (the "school Committee") alleging that the Children were in need of care and protection by reason of being school age, not having been enrolled in school and not having approved home-

school plans on file with the School Committee. A summons was issued to Kim Elizabeth Engler, mother of the Children ("Mother") and George Greeley Bryant, father of the Children ("Father") (collectively, the "Parents"), to appear on June 11, 1997, for initial hearing.

2. On June 11, 1997, the Parents not being present, the court issued new summons to the Parents for July 9, 1997, and ordered in-hand service of the new summons upon the Parents.

3. On July 9, 1997, the Parents appeared and decided to regain private counsel. The case was continued to August 6, 1997, to allow counsel time to prepare.

4. On August 6, 1997, Kristen Snyer, Esq. was appointed to represent the Children pursuant to G.L. c. 119 §29. Attorney Gregory A. Hession ("Attorney Hession") filed an appearance on behalf of the Parents, and Attorney Jeannette McCarthy, Assistant City Solicitor for the City of Waltham ("Attorney McCarthy"), appeared on behalf of the School Committee. (The School committee, the Children and the Parents are hereafter collectively referred to as the "Parties.") Twenty-one exhibits were entered into evidence. The initial hearing was continued to August 13, 1997.

5. On August 13, 1997, neither Attorney Hession nor the Parents were present; and the case was continued to September 12, 1997. The Parties continued to be involved in settlement discussions. These discussions continued as the case went to further hearing on September 12, and October 1, 1997. As of October 22, 1997, it appeared to the Court that the Parties were unlikely to be able to settle the case expeditiously, and

Lori D. Kram, M.A. J.D., was appointed court investigator ("Investigator") pursuant to G.L. c. 119 §24.

6. The Investigator filed her report with the Court on December 3, 1997, and it was admitted subject to cross-examination and motions to strike on December 5, 1997. The case was continued to January 7, 1998, for motions and January 21, 1998, for trial.

7. On December 5, 1997, the Children were identified by the Court.

8. This matter proceeded to trial on January 21, 1998; and testimony was taken on that date, on April 3, and on July 10, 1998.[1] A list of all exhibits introduced at trial ("Exhibits") is attached as an appendix to these Findings and is incorporated herein by reference. Testimony was taken from the following witnesses:

Daniel Doyle	School Dept	1/21/98
Emile Rosenberg, Ph.D.	School Dept	1/21/98, 4/3/98
Lorie Kram, Esq	School Dept	4/3/98
Samuel Blumenfeld, Ph.D.	Parents	7/10/98
Dina Sweeney	Parents	7/10/98

[1] The case was not heard for trial on February 20, March 13, or May 13, at the request of at least one of the Parties with the assent of the others. The inability to schedule this case on a day-to-day basis, while frustrating for the Court, was not unreasonable in light of the fact that the Children did not appear to be a serious risk, the hope of settlement remained, and Parents' counsel had to travel to Waltham from Western Massachusetts.

II. Facts

The following facts are found based upon clear and convincing evidence:

1. George Nicholas Bryant, a subject of this Petition, was born on February 16, 1988, in Newton, Massachusetts, and is ten years old. At all times pertinent to this action, George has resided at 9 Gale Street in Waltham, Massachusetts ("9 Gale Street Address"), and has been in the Parents' care and custody.

2. Nyssa Gale Bryant, the other subject of this Petition, was born on October 26. 1989, in Newton, Massachusetts, and is eight years old. At all times pertinent to this action, Nyssa has resided at the 9 Gale Street Address, and has also been in the Parents' care and custody.

3. Kim Elizabeth Engler, born on November 20, 1960, is the mother of George and Nyssa. She, too, resides at the 9 Gale Street Address.

4. George Greeley Bryant, born on August 31, 1955, is the father of the Children. He resides at the 9 Gale Street Address.

5. In late October, 1996, Daniel Doyle ("Mr. Doyle"), Supervisor of Attendance and Census for the School Committee, received a telephone call from Mr. John Barry, principal of the Fitzgerald Elementary School in Waltham informing him that one Bryant had two school-age children who were not enrolled in school. Mr. Barry gave Mr. Doyle the 9 Gale Street Address and the Parents' telephone number.

6. The 9 Gale Street Address is within the jurisdiction of the Waltham School Committee.

7. Mr. Doyle then went to the 9 Gale Street Address, but found no one at home. Later that day, he telephoned the number he had been given and spoke with the "caretaker of the Bryant children," who informed him that there were two children of school age at that number, both of whom were being schooled at home.

8. At the time, neither of the Children had ever matriculated in the Waltham Public Schools; nor were they attending a private school, nor had a homeschooling plan been filed with the School Committee as to either of them.

9. The next day, Mother called Mr. Doyle and informed him that he did not have the authority to inquire into the Children's education and that she was not required to give him any information. Mr. Doyle informed Mother that she did have the right to homeschool the Children, but that she had to comply with the law regarding homeschooling. Mother asked for a copy of the applicable law.

10. Mr. Doyle then sent mother the documents marked Exhibit 5. Some days later, the Parents sent the documents back to Mr. Doyle, having written "FRAUD" across the face of one (Exhibit 6).

11. Mr. Doyle telephoned Mother and told her the likely consequences of her refusal to comply, including referral to the District Attorney.

12. Subsequently, Mr. Doyle discussed the Bryant matter with personnel from the Department of Social Services ("DSS") and the District Attorney's office, as well as with his own supervisor, Dr. Emile Rosenberg, Assistant Superintendent of Schools for the City of Waltham ("Dr. Rosenberg"). As a result of these conversations, Mr. Doyle filed an application for a criminal complaint in the Waltham District Court pursuant to G.L. c. 76 §2, for failure to send ("Criminal Complaint").

13. After the Parents initial failure to respond to summonses[2] on the Criminal Complaint, a hearing was scheduled before a District Court judge on or about December 30, 1996.

14. In response to service, the Parents sent Mr. Doyle a so-called "Non-Statutory Abatement," later filed in this proceeding as Exhibit 7. Mr. Doyle later received Exhibits 8 and 9. The Parents appeared in Waltham District Court accompanied by their "council," one of whom informed Mr. Doyle he "had better sleep with his eyes open." The criminal complaint was reduced to the status of a civil matter at the request of the District Attorney and the School Committee.

15. Through February 1997, the correspondence between the School Committee and the Parents shows that the School Committee was attempting to inform the Parents of the applicable law and regulations regarding homeschooling in Waltham, while the Parents were vigorously and continually asserting the School Committee's (and the Court's) lack of jurisdiction.

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[2] In fact, it appears that the initial summonses may never have been served upon the Parents.

16. The Parents and the School Committee subsequently entered into discussions to determine whether the case could be resolved. After their initial meeting at Waltham District Court, they met in the Government Center in Waltham on March 17, 1997 ("March Meeting") and at the Waltham Public Library on May 14, 1997 ("May Meeting").

17. The March meeting was attended by Mr. Doyle, Dr. Rosenberg, Attorney McCarthy, Father, Mother and three unidentified adults accompanying the Parents. One of those adults was the same man who had accosted Mr. Doyle at the previous court hearing. One of the unidentified males acted as spokesperson for the Parents, giving certain views of his own about the appropriateness of the School Committee's oversight and the applicability of the Massachusetts Constitution, as well as, perhaps, that of the United States.

18. Dr. Rosenberg explained the issues from the point of view of the School Committee: specifically, that the School Committee is supportive of parents who wish to homeschool their children. The School Committee is "very open" to homeschoolers participating in organized public school instruction and activities to the extent that those parents and children wish such participation, and conversely, does not require any such participation. The School Committee merely requires a written description of how each child is being educated and some testing results to allow it to assess the child's level of achievement.

19. Following the March meeting, the Parents sent Dr. Rosenberg a letter *via* Attorney McCarthy, explaining the Children's educational plan in general terms and

attaching a copy of selected provisions of the Constitution of the Commonwealth, which they describe as their "Plan for Education"(Exhibit 11). The Parents refused to state the Children's names or give anything other than a General Delivery address. Their general comments represent that they pursue a learner-led approach, conduct certain science projects (examples of which are referenced); facilitate the acquisition of mathematics skills by the use of a computer, cuisinaire rods and an abacus; and engage in certain art, music and physical education activities. Reference was also made to Father's Cub Scout activities.

20. In Exhibit 12, the School Committee rejected the Parents' proposed educational plan in that it failed to give the names, dates of birth and grade levels of the Children, as well as statements regarding the hours and days of instruction, the identities of the instructors (and their backgrounds if not the Parents), access to materials, written progress reports and standardized test results.

21. The Parents responded (Exhibit 13) by refusing to provide the information requested and attaching a simplistic and facetious *apologia* for their failure to state the length of their instructional day and year.

22. This skirmish abated during the month of April only to resume in May. Just prior to the May meeting, on May 12, 1997, Dr. Rosenberg repeated the five points contained in his summary attached to Exhibit 12. (Exhibit 14). The next day, May 13, Attorney McCarthy helpfully drafted some sample educational plans that would be approved by the School Committee and attached a copy of *Care and Protection of Charles*, 399 Mass. 324 (1987) ("*Charles*"). The Parents responded

to Exhibit 14 by means of an annotated copy, seemingly complying with the representations requested in points 1 through 3, but declining to provide the portfolios and standardized testing required in points 4 and 5.

23. The persons present at the March Meeting forgathered again for the May Meeting at the Waltham Public Library. That meeting lasted for approximately two hours and achieved no resolution.

24. The next day, May 15, 1997, Dr. Rosenberg sent the Parents a summary of the School Committee's position regarding their non-compliance with its homeschooling procedures.

25. Meanwhile, as the Criminal Complaint was pending before the Waltham District Court, a parallel administrative process had occurred at DSS in response to a report filed by Mr. Doyle pursuant to G.L. c. 119 §51A ("51A Report") on or about February 18, 1997. DSS "screened in" the 51A Report and then did an investigation pursuant to G.L.c. 119 §51B, which resulted in an initial decision to "support" the allegations of the 51A Report. An assessment worker, Dina Sweeney ("Ms. Sweeney"), was assigned by DSS to follow-up the 51B investigation. Ms. Sweeney met with the Parents and saw the Children but was not given access to them to conduct an interview. She was not given permission to speak with any "collaterals." However, as a DSS assessment worker, Ms. Sweeney would have been at liberty to speak with collaterals without the consent form if she had been concerned that the Children were being abused or neglected.

26. In any case, Ms. Sweeney was unable to complete

her assessment; and, after conference with DSS supervisory and legal staff, she closed the case. The support decision with regard to the 51A Report was retroactively changed to "unsupported." At the time the case was closed, Ms. Sweeney had seen no evidence of abuse or neglect, to the extent that she was able to observe, nor did DSS personnel believe that the Children were being abused or neglected. DSS made and administrative determination that, given the allegations, a matter of alleged educational neglect was more properly handled by the School Committee than by DSS.

27. Finally, on June 2, 1997, Mr. Doyle filed this Petition.

28. Following the filing of the Petition, the Parties entered into prolonged attempts to resolve this matter so that the Petition could be dismissed. Exhibits 18 through 27 are indicative of the attempts made by both the Parents and the School Committee to reach an accommodation. Exhibit 22, for example, illustrates substantial progress.

29. After Exhibit 22 was submitted to the School Committee, Dr. Rosenberg responded by providing the "scopes and sequences," or curriculum overviews, for grades one through six of the Waltham Public Schools (Exhibits 23A-F) as an aid to the Parents in further describing their homeschooling curriculum. The Parents responded by merely placing check marks next to the subjects in which they had engaged in some activities. In other words, the resulting document would be described more accurately as an "interest inventory" than as a homeschooling plan.

30. By October, 1997, however, it was apparent that the Parties had reached an impasse.[3] Of Dr. Rosenberg's initial 5 points, first set forth in Exhibit 14, the principal stumbling block continued to be the question of assessment. The Parents had provided the school with the Children's names and birthdates. They had stated that they would be the responsible instructors, and they had provided lists of curricular materials and samples of educational activities with and in which the Children were engaged, albeit in a less detailed form than the School Committee would have liked.

31. However, they continued to refuse to provide any samples of the Children's work or to submit the Children to any standardized testing or to evaluate their competencies, even in general terms such as "commendable," "satisfactory" or "needs improvement." Although the progress reports submitted with Exhibit 22 give a bare indication of the Children's level of competence in math, for example, it would appear from those statements that their principal math activity was calculating change on shopping trips and that their only exposure to fractions was dividing objects amongst family members. These kernels of information are clearly insufficient to determine whether the Children's math skills are appropriate to their ages.

32. The Parents believe, in the words of the Investigator, "that it is not only their right but their obligation to raise and educate their children." Investigator's Report, Exhibit 28, at 2. They believe in a "learner-led" approach to education, in which the

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[3] After the letter marked Exhibit 27, there has been no further correspondence between the Parents and the School Committee related to the submission of educational plans for the Children.

educator (in this case, the Parents) facilitate the child's exploration of his or her own interests. In the course of exploring his or her interests, the child will, perforce, acquire necessary basic skills in the areas of reading, writing and mathematics. Needless to say, this educational philosophy militates against the development of a concrete "curriculum."

33. The School Committee does not object to the Parents using this method of education. It has approved numerous homeschooling plans that involve varied educational methodologies. Fourteen families, representing 23 children, were engaged in homeschooling programs during the 1997-1998 school year, some utilizing the "learner-led" or "non-curriculum based" approaches.

34. The School committee is supportive of homeschooling parents and children and provides them whatever public school resources they choose to utilize so long as it is not disruptive of the normal public school day.[4] Some homeschooling parents and children in Waltham choose to participate in some public school programs and others do not; the School Committee does not require any level of participation for a homeschooling plan to be approved. Although the School Committee's rules require compliance with the guidelines set forth in *Charles, supra*, at 337-340, it is flexible in the application of those guidelines to accommodate the learner-led philosophy.

35. The School Committee does, however, require that parents of homeschooled children between the ages of

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[4] This level of support for homeschooling is not common across the Commonwealth. Exhibit 28 at 7.

6 and 16 inform it of basic facts pertaining to the children's educational level (e.g. grade or skill level) and submit to some evaluation of their level of educational achievement. The latter typically is assessed using standardized testing instruments; however, it can be accomplished through the submission of portfolios of a student's work or through some other means of evaluation. The School committee will provide standardized achievement and aptitude testing free of charge to homeschooled children.

36. The School Committee also requires that parents submit progress reports, which may include portfolios or work samples, either quarterly or semi-annually. Those reports are reviewed by School Committee personnel and feedback can be provided to parents if they desire it. Finally, homeschoolers must participate in certain standardized testing during grades 3, 4, 8, and 10. The School Committee's procedures for submission and approval of homeschooling plans are as described in Exhibit 1.

37. The School committee's requirement for semi-annual or annual progress reports is in accord with the practice of other school districts across the Commonwealth. Exhibit 28 at 7. School districts vary in how often they require such submissions, ranging from quarterly to annually, with many school districts requiring semi-annual reports. *Id.* As for other evaluations, there are private agencies and individuals who conduct baseline educational testing and portfolio review for homsechooling families and certified teachers sensitive to the concerns of homeschooling families who will conduct any required testing. *Id.* Thus, it is certainly possible to comply with the School

District's flexible requirement for homeschooling without violating the integrity of the "learner-lead" approach.

38. The Parents, however, not only refuse to submit the Children to standardized testing; they also refuse even to provide a portfolio of the Children's work for review by the School Committee, viewing that work as the children's private property.

39. Thus, after the two years this case has been in court pursuant to the Criminal Complaint and then this Petition, the Court and the School committee still know virtually nothing about the Children's educational level or mode of instruction. Even the Parents' expert, Samuel Blumenfeld, PHD (Hon.), knew virtually nothing about the Parents, the Children or the Waltham Public Schools and so could be of no assistance to the Court in determining whether or not the Children had achieved intellectual skills appropriate to their ages. He could only express his personal confidence that the Parents, as parents, would foster the education of their Children better than could the Commonwealth or the School Committee.

40. In sum, the Parents insist that the School Committee trust that they will carry out their legal, moral, and religious responsibility to educate their Children with no oversight of their effectiveness in meeting that mandate. The School Committee is understandably reluctant to discharge its legal responsibility to the citizens of the Commonwealth, including the Children, by leaving the matter to blind trust.

41. At the time of trial, neither of the Children had matriculated in the Waltham Public Schools; nor were

they attending a private school. Further, as detailed *supra*, the Parents had never filed with the School Committee a homeschooling plan that was sufficiently, detailed to allow the School Committee to assess the Children's educational level and their progress in the Parents' homeschooling program. Finally, the Parents presented no evidence to indicate that the Children fell under any of the other specific exceptions detailed in G.L. c. 76 § 1.

42. Holt Associates, a homeschooling advocacy organization in Cambridge, Massachusetts, maintains a list f evaluators competent to assess the educational level and progress of children who are being homeschooled using a "learner-led" approach. See Exhibit 28 at 8-9, Paragraph 4.

III. Conclusions of Law

1. This proceeding is governed by the provisions of G.L.c. 119 §1, *et seq.* (the "Statute"), with particular reference to §§ 24 & 26 thereof ("Section 24" and "Section 26," respectively). Specifically, Section 24 directs, in pertinent part, that a petition shall issue under the Statue if "any person" alleges that a child within the jurisdiction of the Court and under the age of eighteen

> Is without: (a) necessary and proper physical or educational care and discipline or; (b) is growing up under conditions or circumstances damaging to the child's sound character development or; (c) who lacks proper attention of parent [sic], guardian with care and custody, or custodian, or; (d) whose parents, guardian or custodian are

unwilling, incompetent or unavailable to provide any such care, discipline or attention....[5]

2. Children between the ages of six and sixteen are required to attend public school unless they fit within one of the specific exceptions set forth in G.L. c. 76, §1, among which is "a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee." See also Charles, supra, at 333.

3. Further, the School Committee is required to "provide for and enforce the school attendance of all children actually residing" in Waltham. G.L. c. 76, s1, 3rd paragraph. It also has an affirmative duty to assure that each child within its jurisdiction receives an adequate education. Massachusetts Constitution, Part II, c. 5 §2; McDuffy, et al. v. Secretary of the Executive Office of Education, et al., 415 Mass. 545, 564-565 (1993).

4. Mr. Doyle, representing the School Committee, was a proper petitioner under Section 24 of the Statute, See *Charles*, supra, at 328-329.

5. Because the School Committee seeks an adjudication that George and Nyssa are children in need of care and protection under the Statute, it must prove by clear and convincing evidence that Mother

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[5] The School Committee relies solely upon Section 24 (d) and does not allege that any of the other grounds set for the in subsections (a) through (d) of Section 24 are applicable to this Petition. See, e.g., Petitioner, Waltham School Committee's Motion for Voluntary Dismissal (partial), dated April 9, 1998, and Petitioner, Waltham School Committee's Request for Findings of Fact and Rulings of Law, 10th request at 6.

and Father are currently unfit to parent George and Nyssa. *See, e.g., Petitions of the New England Home for little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 646 (1975)("New England Home"). Indeed, "the tests 'best interests of the child' ... and 'unfitness of the parent' ... reflect different degrees of emphasis on the same factors, ... the tests are not separate and distinct but cognate and connected." *Id.* at 641.

6. Proof by clear and convincing evidence means that the evidence must induce in the finder of fact a degree of belief greater than that required by proof by a fair preponderance of the evidence and less than that required by proof beyond a reasonable doubt. The proof must be "strong, positive and free from doubt" and "full, clear and decisive." *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 871 (1975) ("*Stone*"), quoted in *Callahan v. Westinghouse Broadcasting Co., Inc.*, 372 Mass. 582, 584 (1977) ("Callahan"). *See also, Adoption of Iris*, 43 Mass. App. Ct. 95, 105 (1997). *Stone* itself relied upon cases stretching back to *Newell v. Homer*, 120 Mass. 277, 280 (1876): "The burden of persuasion ... in those cases requiring a showing of clear and convincing proof is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." This latter formulation is derived from McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242, 263-264 (1944).

7. Although the ultimate finding of "current parental unfitness" must be found be clear and convincing evidence, subsidiary findings of fact need only rest

upon proof by a fair preponderance of the evidence. *Adoption of Mary*, 414 Mass. 705, 710 (1993). However, in this case, the Court has found all facts by clear and convincing evidence.

8 "Unfitness" is a "standard by which we measure the circumstances within the family as they affect the child's welfare. 'The critical question is whether the natural parents are currently fit to further the welfare and best interests of the child.'" *Petition of the Committee of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573*, 589 (198l)("*Petition of DPW*"), quoting *Bezio* v. *Patenaude*, 381 Mass. 563, 570-571 (1980). In determining fitness, the court shall consider the parents' "character, temperament, conduct and capacity to provide for the child" and their readiness to assume parental responsibility as well as the welfare of the child in the context of his or her "particular needs, affections and age." *See* e.g., *Adoption of Mary*, 414 Mass. 705, 711 (1993); *see also Adoption of Carlos*, 413 Mass. 339, 348 (1992)

9. Further, "[a] parent may not be deprived of the custody of [his or her] minor child in the absence of a showing that they 'have grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard' or 'unless some factor such as lengthy separation and a corresponding growth in the ties between the child and the prospective adoptive parents indicates that the child would be hurt by being returned to the natural parents.'" *Petition of DPW* at 590, quoting *New England Home* at 639,646.

10 A parent's fundamental liberty interest in the "care, custody and management" of his or her child had long been recognized in both the courts of the United States and those of the Commonwealth. *See, e.g.,*

Santosky v. Kramer, 455 U.S. 745, 753 (1982); *Wisconsin v. Yoder,* 408 U.S 205 (1972); *Pierce v. Society of Sisters,* 268 U S. 510 (1925); *Petition of the Dept of Publ. Welfare to Dispense with Consent to Adoption,* 383 Mass. 573, *587(1981); Richards v. Forrest,* 278 Mass 547 (1932).

11. Nevertheless, despite the fact that the standard is "current parental unfitness," "It is not the quality or character of parental conduct per se that justifies State intervention on behalf of an abused, neglected or otherwise endangered child. Rather, it is the endangerment itself." *Custody of a Minor,* 389 Mass 755,766 (1983) ["Custody of a Minor (1983)"].

12. This case is governed by *Charles, supra,* which held that the requirements of G.L. c. 76, § I, provide the substantive standard for whether or not a child is the object of educational neglect under the Statute. Indeed, but for *Charles,* this case would long ago have been dismissed. Under any fair reading of the case law interpreting the Statute, including the cases referred to in paragraphs III.8 through 11, *supra*, there is clearly insufficient evidence to make a finding of "current parental unfitness." The only report of abuse or neglect with regard to the Children was the 5IA Report filed by Mr. Doyle based solely upon the Parents failure to comply with G.L c 76, § 1. The Department investigated the 5IA Report and ultimately "unsupported it" based upon the failure to document any protective concerns with regard to the Children.

13. In effect, this case is a G.L. c.76, §2 case in which the Parents are no doubt guilty of failure to send under the terms of that statute. However, particularly in view of the minor monetary penalties that can be imposed

for violation of G.L. c.76, §1,[6] the School Committee has no doubt felt compelled to invoke the equitable powers available to the juvenile Session of this Court when hearing cases brought under the Statute, In brief, the Court is being asked, under the aegis of [the Statute, to compel compliance with G.L. c.76, §1, in the absence of any positive evidence of actual neglect of the Children's educational needs by the Parents.

14. To be sure, the School Committee finds itself in an untenable position; on the one hand, it is supportive of homeschooling and do not wish to intrude into the Parents' and Children's privacy any more than is necessary to fulfil its own obligations to the Commonwealth and to the Children; on the other hand, it is required to assure itself at a bare minimum, that the requirements contained in G.L. c.76, §1, are being enforced and that the Children's educational needs are being met, Indeed, the School Committee has been effectively prevented from evaluating whether or not educational neglect exists, much less proving its existence, by the Parents' failure to provide any information regarding the Children's educational level, their mastery of basic skills or the methods being used to educate them.

15 In the face of the clear mandate of *Charles*. The Parents view the School Committee's insistence on

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[6] Section 2 of G.L. c. 76 ("Section 2") currently provides for a fine of $20 for every six-month period during which the parents has not caused the child to attend school for all but 7 full-day or 14 half-day sessions. The amount of the fine has not changed since the enactment of Chapter 240 of the Acts of 1852, although other provisions of Section 2, such as the period of time a child must attend school, have changed as a result of amendments enacted a various times between 1860 and 1921.

obtaining such information as unnecessarily intrusive and urge this Court to rule that the standard enunciated in *Charles* should not be followed because it violates, *inter alia*, the provisions of Article XXX of the Massachusetts Declaration of Rights, which establishes a strict separation of powers amongst the executive and judicial departments. Whatever the merit, of the Parents' argument, this Court declines to reach this question in the face of the clear language of Charles, a case that is indistinguishable from this one. In *Charles;* the Court stated as follows:

> Having concluded that the approval process under G.L. c 76, §1, is constitutionally permissible, we caution the superintendent or school committee that the approval of a home school proposal must not be conditioned on requirements that are not essential to the State interest in ensuring that "all the children shall be educated" We recognize "that courts are not school boards or legislatures and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."... However, ...we offer some guidance on the extent to which approval of a home school proposal may be conditioned on certain requirements without infringing on the liberty interests of the parents under the Fourteenth Amendment

(Citation omitted) In other words, the Court, in furtherance of its duty to interpret the Statute in a manner not violative of the Massachusetts and United States Constitutions, appears to have created a safe harbor for school committees to use in deciding what requirements are appropriate to impose when

considering' a home school proposal.

16. If the guidelines promulgated in *Charles, supra*, at 337-340, are a safe harbor for a school committee, they also appear to erect a *per se* standard for assessment of educational neglect. In other words, failure to comply with a school committee's requirements so long as those requirements are within the safe harbor, would be *prima facie* evidence of educational neglect subjecting the parents to an unfitness determination under the Statute.

17. In this case, the School Committee's requirements (Exhibit 1) are clearly within the safe harbor established by *Charles*; and the Parents have failed to provide a minimally adequate educational plan. Therefore, under the guidelines of *Charles*, the Parents are *per se* "currently unfit"

18. *Charles, supra, at 338*, provides that once the parents have filed a home school proposal and it has been rejected by the school committee,

> The burden of proof under G.L. c.119 or G.L. c. 76,§2, shifts to the school committee to show that the instruction outlined in the home school proposal fails to equal "in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town *[sic]*....

(Emphasis supplied.) This guideline does place the ultimate burden of proof on the school committee, as it clearly should be under both an C. 119 or G.L. c, 76, §2; however; it does not address the Circumstance presented by this case, in which the Parents never filed educational plans that were formally adequate within

the guidelines set forth in *Charles*.[7] Consequently, the burden has never shifted under *Charles;* and the Parents must be held to a *per se* standard neglect if they are to be found "currently unfit," as *Charles* contemplates that they would be in these circumstances. Suffice it to say that placing the initial burden of proof upon the parent is highly unusual, if not unique, in cases decided under the Statute,

19. In addition to their separation of powers challenge, the Parents argue that their due process rights were violated because the School Committee did not establish specific and objective requirements for them to meet in submitting educational plans for the Children and therefore rejected the plans proffered by the Parents without sufficient basis. First, the School Committee did establish specific and objective requirements the Parents to follow; the Parents simply chose not to fulfill them, Further, the requirements established by the School Committee were well within the safe harbor established by *Charles*. Ultimately, this argument is foreclosed by Charles, *supra*, at 329-333 and 337-340.

20. The Parents further contend that their rights under Article XII of the Declaration of Rights are violated by being required to provide the information the School Committee has requested pursuant to G.L. c. 76, §1, and *Charles, supra*. The issues raised by this Article XII challenge to G.L. c.76, §1, were effectively

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[7] The emergence of this case, was foretold in Prof. Ira Lupu's critical commentary on Charles, which discussed the inherent difficulties of the Court's resolution of that case. Ira C. Lupu, Home Education, Religious Liberty, and the Separation of Powers, 67 B.U.L. Rev. 971, 980-985 (1987).

dealt with by the Supreme Judicial Court in both *Charles* and *Attorney General v. Bailey*, 386 Mass. 367(1982) ("*Bailey*"), even thought, in those cases, G.L, c.76, §1, was being challenged only under the United States Constitution rather than under Article XII.[8]

21. Finally, the Parents ask this Court to entrust the Children's education to them alone, with no oversight by the School Committee, as the least restrictive means to ensure that children are properly educated," referring to A S. 14.30.010. No matter what the wisdom of the Alaska statute regarding homeschooling, is not a Massachusetts statute and this Court cannot choose to impose its terms in this case in derogation of Massachusetts statutory and case law.

IV. Adjudication and Order

Based upon the above Findings of Fact and Conclusions of Law, this court finds as follows upon clear and convincing evidence:

I. that Mother and Father are unwilling to provide for the Children's educational care and discipline within the meaning of *Charles, supra;*[9] and

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[8] In *Charles*, the Court examined the constitutionality of G.L. c. 76 §1, under the Fourteenth Amendment to the United States Constitution, *inter alia*; while in *Bailey*, the challenge had proceeded under the First and Fourth Amendments.

[9] That is, they are "currently unfit" to assume parental responsibility for the Children. The case law, as set forth more particularly supra, requires such a finding for the court to retain jurisdiction of the case; although in this case, as apparently in *Charles*, there is no positive evidence of the parents; "unfitness" as that term is commonly understood. Comparison of the facts of this case with those of other cases decided by the Supreme Judicial Court or the Appeals court under Sections 24 and 26 of the Statute, with the

2. that Mother and Father are unlikely to comply with the guidelines set forth in *Charles,* for the foreseeable future.

Consequently, in accordance with the mandate of *Charles,* this court hereby orders as follows:

1. If the Parents intend to homeschool the Children during the 1998-1999 school year, they shall

   a) file with the Schoo1 Committee an educational plan for each of the Children for the 1998-1999 school year in the form they previously utilized for the 1997-1998 school year (specifically, the form used in Exhibit 22);

   b) obtain a professional evaluation of each of the Children's educational level and whether or not they have reached an age appropriate cognitive development and have acquired age appropriate knowledge and skills, those evaluations to be made by an independent evaluator On the Holt Associates list (referenced in Exhibit 28 at 8) or by an evaluator acceptable to the School Committee, within its sole discretion; and

   c) file such educational plans and evaluations with the School Committee on or before 8 September 1998.

2. If the parents do not intend to homeschool the Children during the 1998-1999 school year, they

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sole exception of *Charles,* illustrate that the facts of this case are not those generally contemplated in the case law or in the Statute.

shall have enrolled the children, on or before 8 September 1998, in the Waltham Public Schools or in a private school approved by the School Committee.

3. If the Parents have not fully complied with Paragraphs 1 or 2 of this Order on or before 8 September 1998, temporary custody of the Children will be transferred to the Department.

SO ORDERED.

S/ Margaret S. Fearey, Associate Justice

Dated: 31 July 1998

APPENDIX

EXHIBITS

NUMBER	***NAME***	***PARTY***
1	Procedures for Consideration of Home Schooling Requests, Waltham Public Schools	School Dept
2	Birth Certificate of Nyssa Gale Bryant	School Dept
3	Birth Certificate of George Nicholas Bryant	School Dept
4A	Quitclaim Deed to 9-I I Gale Street, Waltham, Massachusetts, and another parcel, running to Kim E. Engler and George G. Bryant, as joint tenants,	School Dept

inter alia

4B	Quitclaim Deed to 9-11 Gale Street, Waltham, Massachusetts and another parcel, running to Kim E. Engler and George G. Bryant, as tenants by the entirety	School Dept
5	Memorandum from Dr. Emile Rosenberg to Kim Engler & George Bryant, dated November 8,1996, inscribed with the word "FRAUD"	School Dept
6	Letter from Kim E. Engler to Mr. Daniel E. Doyle, dated November 14, 1996	School Dept
7	Document entitled "Part One. Non- Statutory Abatement," &c.	School Dept
8	Document entitled "Part Two. Non-Statutory Abatement," &c,	School Dept
9	Letter from Daniel E. Doyle to Mr. George Bryant and Ms. Kim Engler, dated February 6,1997	School Dept
10	Letter from George Greeley: Bryant [sic] and Kim Elizabeth: Engler [sic] to Daniel E. Doyle, dated February 12, 1997	School Dept
11	Letter from George Greeley: Bryant [sic] and Kim Elizabeth: Engler [sic] to Jeannette [sic] A. McCarthy,	School Dept

	dated March 20, l997 with attachment	
12	Letter from Jeannette A. McCarthy to Ms. Kim E. Engler and Mr. George G Bryant, dated March 25, 1997, with attachment	School Dept
13	Letter from George Greeley: Bryant and Kim Elizabeth: Engler to Jeannette A. McCarthy and Dr. Emile Rosenberg dated March 27, 1997	School Dept
14	Document signed by Emile Rosenberg and dated 5/12/97	School Dept
15	Letter from Jeannette A. McCarthy to Ms. Kim Elizabeth: Engler and Mr. George Greeley Bryant dated May 13, 1997, with attachment.	School Dept
16	Copy of document signed by Emile Rosenberg and dated 5/12/97, Exhibit 14, with holographic notations by George Greeley: Bryant and Kim Elizabeth: Engler dated May 14, 1997	School Dept
17	Letter from Dr. Emile Rosenberg to Ms. Kim Elizabeth Engler and George Greeley Bryant, dated May 15, 1997	School Dept
18	plan for Education For [*sic*] the Family of George	School Dept

	Greeley: Bryant and Kim Elizabeth: Engler	
19	Memorandum from Dr. Emile Rosenberg to Atty. Jeannette A. McCarthy, dated July 7, 1997	School Dept
20	Plan for Education 1997-1998 For the Family of Greeley: Bryant and Kim Elizabeth; Engler	School Dept
21	Memorandum from Dr. Emile Rosenberg to Atty. Jeannette McCarthy, dated September 11,1997	School Dept
22	Plan for Education 1997-1998 For the Family of Greeley: Bryant and Kim Elizabeth; Engler	School Dept
23A	Grade One Curriculum Overview, Waltham Public Schools	School Dept
23B	Grade Two Curriculum Overview, Waltham Public Schools	School Dept
23C	Grade Three Curriculum Overview, Waltham Public Schools	School Dept
23D	Grade Four Curriculum Overview, Waltham Public Schools	School Dept
23E	Grade Five Curriculum Overview, Waltham Public Schools	School Dept
23F	Grade Six Curriculum Overview, Waltham Public Schools	School Dept

24	Annual Progress' Report 1996-1997 For the Family of George Greeley: Bryant and Kim Elizabeth: Engler [Child George Nicholas: Bryant]	School Dept
25	Annual Progress' Report 1996-1997 For the Family of George Greeley: Bryant and Kim Elizabeth: Engler [Child Nyssa Gale: Bryant]	School Dept
26	Memorandum from Dr. Emile Rosenberg to Atty. Jeannette McCarthy, dated September 30, 1997	School Dept
27	Letter from George Greeley: Bryant and Kim Elizabeth: Engler to Dr. Emile Rosenberg c/o Jeanette A. McCarthy, dated October 01[sic], 1997	School Dept
28	Report of the Independent Investigator, Lorie D. Kram, M A., J.D., 1.0., dated December 3, 1997	School Dept
29	School District Profile. Waltham	Parents
Resp. A	Certified copy of A.S. 14.30.010	Parents

Appendix D

A CONSTITUTION

OR

FORM OF GOVERNMENT

FOR

The Commonwealth of Massachusetts

PREAMBLE

The end of the institution. maintenance and administration of government is to secure the existence of the body-politic, to protect it and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: And whenever thee great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness. --The Body-Politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each Citizen. and each Citizen with the whole people, that all shall be governed by certain Laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them. WE, therefore, the people of Massachusetts, acknowledging with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an

opportunity, deliberately and peaceably, without fraud, violence or surprize, or entering into An Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government, for Ourselves and Posterity; and devoutly imploring His direction in so interesting a Design. DO agree upon, ordain and establish, the following *Declaration of Rights, and Frame of Government* as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

Part the First
A Declaration of the Rights Of the Inhabitants of the Commonwealth of Massachusetts.

Art. I. All men are born free and equal and have certain natural, essential, and unalienable rights; among which way be reckoned the right of enjoying and. defending their Lives and liberties: that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. It is the right as well as the Duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe. And no Subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshipping GOD in the manner and season most agreeable to the Dictates of his own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship.-

XII. No subject shall be held to answer for any Crimes or Offence, until the same is fully and plainly,

substantially and formally described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favourable to him to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capitol or infamous punishment, excepting for the government of the army and navy, without trial by jury.

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, Liberty and property, according to standing Laws. He is obliged, Consequently, to contribute his share to the expence of this protection; to give his personal service, or an equivalent, when necessary: But no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this Commonwealth are not controulable by any other Laws then those to which their Constitutional representative body have given their consent And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All

warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously be supported by oath or affirmation; and if the order in the warrant to a civil Officer, to make search in suspected places, or to arrest one or more suspected persons, to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.-

Article III in pertinent parts states:
"...And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the Subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can Conscienciously and conveniently attend. --

Massachusetts G. L. 119:24.
Procedure to commit child to custody or other disposition.

Section 24. The divisions of the juvenile court department, upon the petition of any person alleging on behalf of a child under the age of eighteen years within the jurisdiction of said court that said child is without: (a) necessary and proper physical or educational care and discipline or; (b) is growing up under conditions or circumstances damaging to the child's sound character development or; (c) who lacks proper attention of parent, guardian with care and custody, or custodian or; (d) whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care, discipline or attention may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made. Said summonses shall include notice that the court may dispense with the consent of the parents to the adoption of the child if it finds that the child is in need of care and protection and that the best interests of the child would be served by said disposition. Notice shall be by personal service upon the parent. If the identity or whereabouts of a parent is unknown, the petitioner shall cause notice in a form prescribed by the court to be upon served upon such parent by publication of said notice once in each of three successive weeks in such newspaper as the court orders. If after reasonable search no such parent can be found, summons shall be issued to the child's lawful guardian, if any, known to reside within the commonwealth, and if not, to the person with whom such child last resided, if known. If, after a recitation

under oath by the petitioner of the facts of the condition of the child who is the subject of the petition, the court is satisfied that there is reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the Court may issue an emergency order transferring custody of a child under this section to the department or to a licensed child care agency or individual described in clause (2) of section twenty-six. Said transfer of custody shall be for a period not exceeding seventy-two hours, except that upon the entry of said order, notice shall be given to either or both parents, guardian with care and custody, or other custodian, to appear before said court. The court at this time shall determine whether such temporary custody should continue until a hearing on the merits of the petition for care and protection is concluded before said court. Upon the issuance of the precept and order of notice the court shall appoint a person qualified under section twenty-one, to make a report to the court under oath of an investigation into conditions affecting the child. Said report shall then be attached to the petition and be on a part of the record. The jurisdiction of the Boston juvenile court for the subject matter of this section shall extend to the territorial limits of Suffolk county. Any child may be committed to the department under this section without a hearing or notice with the consent of the parent or parents or guardian.

AFFIDAVIT OF PAMELA FINLEY

STATE OF ALASKA)
FIRST JUDICIAL DISTRICT) ss
AT JUNEAU)

I, Pamela Finley, being first duly sworn, do state as follows:

1. I am the Revisor of Statutes for the State of Alaska
2. My duties as revisor include directing the publication of the Alaska Statutes and retaining a copy of the Alaska Statutes.
3. I certify that attached hereto as Exhibit 1, and incorporated by reference herein, is a true and correct copy of the most recent version of AS 14.30.010, as it appears in the 1997 Supplement to the Alaska Statutes.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

S/Pamela Finley

SUSCRIBED AND SWORN TO before me this 2nd day of January, 1998.

S/Wen C. Ibesate
Notary Public, State of Alaska,
My commission expires 7/29/99

97-132.1mb

STATE OF ALASKA
OFFCIAL SEAL
Wen C. Ibesate
NOTARY PUBLIC

Sec. 14.30.010. When attendance compulsory. (a) Every child between seven and 16 years of age shall attend school at the public school in the district in which the child resides during each school term. Every parent, guardian or other person having the

responsibility for or control of a child between seven and 16 years of age shall maintain the child in attendance at a public school in the district in which the child resides during the entire school term, except as provided in (b) of this section.

(b) This section does not apply if a child

(1) is provided an academic education comparable to that offered by the public schools in the area, either by

(A) attendance at a private school in which the teachers are certificated according to AS 14.20.020;

(B) tutoring by personnel certificated according to AS 14.20.020; or

(C) attendance at an educational program operated in compliance with AS 14.45.100 – 14.45.200 by a religious or other private school;

(2) attends a school operated by the federal government;

(3) has a physical or mental condition that a competent medical authority determines will make attendance impractical;

(4) is in the custody of a court or law enforcement authorities;

(5) is temporarily ill or injured;

(6) has been suspended or expelled under AS 14.03.160 or suspended or denied admittance under AS 14.30.045;

(7) resides more than two miles from either a public

school or a route on which transportation is provided by the school authorities, except that this paragraph does not apply if the child resides within two miles of a federal or private school that the child is eligible and able to attend;
(8) is excused by action of the school board of the district at a regular meeting or by the district superintendent subject to approval by the school board of the district at the next
regular meeting;
(9) has completed the 12th grade;
(10) is enrolled in
(A) a state boarding school established wider AS 14.16; or
(B) a full-time program of correspondence study approved by the department; in those school districts providing an approved correspondence study program, a student may be
enrolled either in the district correspondence program or in the centralized correspondence study program;
(11) is equally well-served by an educational experience approved by the school board serving the child's educational interests despite an absence from school, and the request for excuse is made in writing by the child's parents or guardian and approved by the principal or administrator of the school that the child attends;
(12) is being educated in the child's home by a parent or legal guardian.

Appendix E.

Commonwealth of Massachusetts

Middlesex, ss

District Court Department
Waltham Division
Juvenile Session

In Re: Care and Protection of) George Nicholas Bryant) and Nyssa Gale Bryant)	Docket No. 9751 CP 10

Petition to Vacate

The Constitution of the Commonwealth's rules and regulations govern all actions of government officers first and foremost. "The people of this commonwealth are not controulable by any other laws than those to which their constitutional representative body have given their consent." (Massachusetts Constitution, Part the First, Article X) "The judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men." (Massachusetts Constitution, Part the First, Article XXX) "No subject shall be held to answer for any Crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself." (Massachusetts Constitution, Part the First, Article XII) "And further, full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws,

statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution..." (Massachusetts Constitution, Part the Second, Chapter I, Section I, Article IV)

In the Court's decision "FINDINGS OF FACT AND CONCLUSIONS OF LAW" ("Court's Findings") actions have been taken that are repugnant and contrary, to the Constitution. For the reasons set forth below, the Respondents petition the Court to vacate the Court's decision and find the Children without need of Care and Protection.

I. The Applicability of Charles

1. In the Court's Findings, III Conclusions of Law, section 15 (exhibit A) the Court outlines the parents' view that the standard enunciated in Care and Protection of Charles, 399 Mass. 324 (1987) ("Charles") should not be followed because it violates, inter alia, the provisions of Article XXX of the Massachusetts Declaration of Rights. The Court states "Whatever the merits of the Parents' argument, this Court declines to reach this question in the face of the clear language of Charles, a case which is indistinguishable from this one." If this case is indistinguishable from Charles, then the Court has reached the standard enunciated in Charles, and therefor, the Court has determined that Charles is Constitutional. Since the Court declined to answer this question, when it was presented, it should have been raised to a court that would answer it, without proceeding in this matter until the question was answered.

2. Alternatively, in the Court's Findings, Conclusions of Law, section 18 the Court states "However, it [Charles] does not address the circumstance presented by this case..." this being true, this case is distinguishable from Charles and the Court must rule on the merits of the case as she finds in III, section 12, "Indeed, but for Charles, this case would long ago have been dismissed."

II. Violations of Article XII

The Court in this matter has refused to uphold the provisions of Article XII, supra. This is evidenced by the following facts:

1. On July 9th 1997 the parents appeared and specifically asked for a copy of the petition in accordance with Juvenile Court Rule number 2 adopted Effective April 15, 1996. They were informed that this rule does not apply to this proceeding, that there was no requirement for the court to provide them with the petition identifying what they were charged with. Nor were the parents permitted to obtain a copy of the affidavit in support of the petition. When the parents asked what rules apply to the proceeding, the judge informed them that there are no rules for this court, and that they needed to retain an attorney to be able to follow the court proceedings, because sometimes civil rules of procedure were followed and sometimes criminal rules of procedure were followed.

2. In the Court's Findings, part I Procedural History, section 1 the Court states " The Petition ...alleg[ed] that the children were in need of care and protection by reason of being school age, not having been enrolled in school and not having approved home-school plans on file with the School Committee." Such finding is in

error, for we find no allegation within Mr. Doyle's affidavit (exhibit 2) that the children are in need of care and protection for any reason.

3. Prior to the start of the trial the Respondents submitted to the Court a "MOTION FOR MORE DEFINITE STATEMENT/BILL OF PARTICULARS" (exhibit 9 without annotations) requesting that the court direct the Waltham School Department ("Waltham") to provide the parents with a specific charge of precisely what they were being charged with. The Court refused to so order and instead requested a formal statement of position from both the Petitioner and the Respondents. In their "FORMAL STATEMENT OF POSITION" the Respondents again stated that "... Waltham has not plainly substantially and formally described to us the crime or offense they accuse them of violating and specifically how they violated it." This plaint was never addressed by the Court.

4. In Dr. Rosenberg's "FORMAL STATEMENT OF POSITION", the Petitioner did not state any section of G.L. c. 119, section 24 or indicate that the Respondents were charged with a violation of G.L. c. 76, section 1. Nor did they identify precisely which or specifically how any law of the Commonwealth was being violated. They alleged nothing with respect to the care, discipline or environment of the children in either this document or within their affidavit.

5. Because Article XII was not complied with, the attorney for the respondents, assumed that the parents were charged under G.L., c. 119 subsection 24 (a) "educational neglect" since this was the charge stated in Daniel Doyle's allegation to DSS in the 51A report. See also Dina Sweeney testimony, III at page 68, and

Court's Finding of fact, section 26.

6. The confusion over the charge is obvious in examining Waltham's "PETITIONER, WALTHAM SCHOOL COMMITTEE'S MOTION FOR VOLUNTARY DISMISSAL (PARTIAL)" where they formally move for voluntary dismissal of any and all claims except those relating to G.L.M. Chapter 119, section 24 (d) while stating in their attached memorandum of fact and law "the Waltham School Committee has never alleged claims of educational neglect (pursuant to Chapter 119, Section 24 (a) or 24 (b) or 24 (c)." part I section 6. Why would they move for voluntary dismissal of these claims if they never alleged them? Additional evidence of the confusion of the charge is set forth in the "PARENTS' OPPOSITION TO WALTHAM'S MOTION FOR VOLUNTARY PRETRIAL DISMISSAL".

7. During court testimony on day 1, Attorney Hession asked Mr. Doyle if he has any evidence to indicate that the parents violated G.L. c 119, section 24 parts (a) (b) (c) or (d). Mr. Doyle replied in the negative to each of these and additionally for (d) stated "I didn't say that, they definitely --".

8. During court testimony, on Day 1 Attorney Hession was interrupted by Attorney McCarthy who stated "I don't know if we were being charged with violating 76-1."

9. The failure of the Petitioner to fully and plainly, substantially and formally identify the crime or offense has made it impossible for the parents to answer to such allegations.

10. In the Court's Findings at III-20 the Court states

that the issues raised by this Article XII challenge, were effectively dealt with in both Charles and General v. Bailey, 386 Mass.367, but neither of these cases addressed Article XII of the Massachusetts Constitution as the Court states in footnote 8. The First, Fourth and Fourteenth Amendments to the United States constitution are not identical to Part the First, Article XII of the Massachusetts Constitution. It is not clear whether the issues raised by this Article XII challenge have ever, in fact, been addressed. Therefor this finding is in error and is not fact.

11. The Court's Findings at Part II, section 10 discusses documents marked exhibit 5. The parents do not have access to the court's file and cannot determine from the proceeding what is contained in these documents. In the absence of such access, the parents agree with the statements made by Dr. Rosenberg "in early November he sent the typical two page notice to the family, including a cover sheet regarding a submission of home schooling plan, and attachment of this particular item; ..." Transcripts, day I, page 100. If any items other than those stated herein are found in exhibit 5, then this finding (section10) is in error.

12. Members of the Waltham School Department refused to provide proof of authority in the form of oaths of office and Law as requested by the parents and repugnant to the requirements of the Constitution of the Commonwealth.

13. Court's Finding of Law, III-5 states that the School Committee seeks an adjudication that George and Nyssa are children in need of care and protection under the Statute. There is no evidence to support this.

14. The Court's findings at III-1 and III-12 are contradictory. This case should be governed by Law, where law is defined as an act of the General Court so as the same be not repugnant or contrary to this Constitution, (Part the Second, Chapter I article IV, supra) as set forth in 1, and not by opinion as set forth in 12.

III. The Petitioner

1. All court documents submitted by the Attorney for the Petitioner state the Petitioner is the Waltham School Committee ("School Committee"). (exhibit 24) The School Committee is made up of seven members, one of whom is Mayor as Chairman. No member of the school committee may, while a member thereof, hold any other office or position in the Waltham School Department ("Waltham"). Therefor Mr. Doyle and Dr. Rosenberg, as "Supervisor of Attendance and Census" and "Assistant Superintendent" respectively, are not members of the School Committee.

2. G.L., c. 119, section 24 states that the petition may be brought by any person.[emphasis added] however, Attorney Snyer in her "Proposed Findings of Fact and Conclusions of Law for Respondent Children" identifies the Waltham School Committee as "designated agents of the legislature of the Commonwealth of Massachusetts...". . The Court's Finding at II-27, and III-4 erroneously indicate Mr. Doyle is the Petitioner, where all documents submitted by the Petitioner, show the School Committee as Petitioner. A governmental body of the Commonwealth, is not a person and has no authority to bring any civil action against the

Inhabitants. Section II-8 also shows that neither of the children had ever matriculated in the Waltham Public Schools, an indication that no obligation had existed or currently exists between the Family and Waltham regarding the children.

3. Several sections of the Court's Findings, erroneously attribute actions of Mr. Doyle or Dr. Rosenberg to the School Committee. Among these findings are the following: (a) under I. Procedural History, sections 1 and 5; (b) under II. Facts, sections15, 16 (section 17 and 23 contradict section 16), 20, 24 (there is no evidence of an emergency school committee meeting that would result in a determination of the position stated), 28, 30 (and the footnote referenced in 30), 33 and 36(there is no evidence that School Committee personnel have ever reviewed or approved any homeschooling plans) 41 (there is no evidence that the school committee ever reviewed any material sent by the parents); (c) under III Conclusions of Law, section 18.

4. These errors of facts, if corrected would show that there is no correspondence in evidence from the School Committee to the parents; that there is no evidence that the parents' correspondence was reviewed by the School Committee, and that there is no evidence that the parents met with the School Committee.

5. The Petitioner, Waltham School Committee, or any of its members, have not testified in the proceeding.

IV. Property Rights of the Family

1. The Court's Findings at II-38 states that the parents

view a portfolio of the Children's work as the Children's private property. The Court's refusal to find as fact that the family owns the products of its endeavors, is an error of both fact and law. This error is then used to deny the family protection under the provisions of Article XIV of the state constitution.

2. The Court's Findings at II-18 states that the "School committee merely requires ..." The issue is not whether these requests are minimally intrusive, but whether these requirements can even be codified in the Law of this Commonwealth. It is established in Dr. Rosenberg's testimony that the requirement on the part of the School Committee for grade level assignment is not in law. The respondents, are understandably unwilling to produce any information to the Petitioner in the absence of law.

V. Chapter V Section II

1. Part the Second, chapter V, section 2 (see exhibit 11) proclaims "... a duty of Legislatures and Magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences..." The word cherish, meant then, as it does now, "to care for tenderly; nurture, to cling fondly or inveterately to."[1] This most certainly is not the same as "assuring that each child within its jurisdiction receives an adequate education" Court's Findings III-3 nor is it the same as "enforcing the school attendance" Court's Findings III-3.

2. Given the words of the Constitution, we do not find a

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[1] The Random House Dictionary of the English Language, 1983.

requirement for Legislatures and Magistrates to "...assure itself, that the Children's educational needs are being met." Court's Findings III-14.

3. Given the words of the Constitution, we do not find authority to "..decide what requirements are appropriate to impose", Court's Findings III-15, on families educating their children.

4. The Court's Findings at III-15 states "Parents view the School Committee's insistence on obtaining such information as unnecessarily intrusive." The fact that it is unnecessarily intrusive is evidenced by exhibit A. The people of the state of Alaska cannot have more freedom than the people of the commonwealth of Massachusetts. A.S. 14.30.010 shows a codification of encouragement and cherishing, with respect to parents educating their own children, that is in fact codified even more broadly in Chapter V, section II of the Constitution of the Commonwealth of Massachusetts.

VI. Clear and Convincing Evidence

1. The Court's Findings at III-16 state that "...failure to comply with a school committee's requirements,... would be *prima facie*, evidence of educational neglect..."

2. The Court's Findings at IV. Adjudication and Order, section 1, is that "...upon clear and convincing evidence the parents are unwilling to provide for the Children's educational care and discipline within the meaning of Charles..."

3. That is, the Court finds upon clear and convincing

evidence that there is *prima facie* evidence of educational neglect. This proof cannot be *both prima facie* and clear and convincing, and contradicts Court's Findings in III. Law, section 7 that "...all facts have been found by clear and convincing evidence."

VII. Decision by Inference

1. In the Court's Findings, II-41, the Court states "Finally, the Parents presented no evidence to indicate that the Children fell under any of the other specific exceptions detailed in G.L. c. 76, section 1". The Petitioner presented no evidence regarding "other specific exceptions detailed in G.L. c. 76, section 1". In the absence of such evidence on the part of the Petitioner, the Court may not infer anything regarding these exceptions.

2. The Court's Findings II - 5, is not in evidence and therefor not a fact. Mr. Doyle first stated "Mr. Barry had informed me that allegedly there was a gentleman by the name of Bryant who had two school-aged children who were allegedly not enrolled in a school program." transcript p 32 During cross-examination, he clarified this by stating "Mr. Barry, the principal at the Fizgerald, told me that he had received an anonymous phone call alleging that a gentleman by the name of Mr. Bryant had two school-aged children who were not attending school" Transcript p 61-62 Thus, Mr. Barry did not make the allegation stated in this finding, he stated that allegedly there was a person, based on an anonymous phone call. Thus, in violation of Massachusetts Constitution, Part the First, Article XIV, Mr. Doyle had no oath or affirmation to support his investigation of this family.

3. The Court apparently relies on these findings, *inter alia*, to conclude "In effect, this case is a G.L. c. 76, section 2 case, in which the parents are no doubt guilty of failure to send under the terms of that statute." III-13. No such conclusion may be inferred from the facts presented in evidence. Because the Parents are not so charged in this matter, they were not required to respond to such charge. In fact, given that charges under G.L. c. 76, section 2 were first changed to Civil, and then dismissed upon request by the Commonwealth, in concurrence with Mr. Doyle, we must infer that the Commonwealth had insufficient evidence to support such complaint.

4. The Court's Findings at III-13 indicates that the Court is being asked to substitute the use of G.L. c. 119, section 24 to enforce G.L. c. 76, section 1 in place of the statutorily created mandate of the General Court in G.L. c. 76, section 2. To do so is unconstitutional, per Part the First, Article X and Article XX of the Massachusetts Constitution and should not lie. If the School Committee feels that the monetary penalties imposed for violation of G.L. c. 76, section 2 are minor, they may petition the General Court for change.

5. The Court's Findings at II-25 states Ms. Sweeney "was not given permission to speak with any 'collaterals'." Ms Sweeney did not indicate in her testimony that she had asked the parents for permission to speak with collaterals, and in fact indicated that the DSS Investigator had spoken with collaterals. The Court may not imply from this that the parents placed any restrictions on Ms. Sweeney's actions with respect to collaterals.

6. The Court's Findings at III-14, and others, infers that

it is somehow the fault of the parents that the Petitioner has no evidence. It is not the duty and responsibility of this Court to violate or nullify the Constitution in an attempt to find, establish or create evidence for the Petitioner.

VIII. Prejudicial Findings

A number of the Court's findings are not in evidence or contain the Court's opinions in such a manner as to be prejudicial against the parents:

1. It is implied from the Court's Findings I-1 that the parents ignored (or defied) a summons for a court appearance on June 11, 1997. The parents received no summons to appear in court on June 11, 1997. This question was not addressed in any manner during the trial. No evidence was presented to show service upon the Respondents for the June 11th proceeding. This finding is irrelevant to the proceedings and is prejudicial to the parents when exculpatory evidence to the contrary was ignored.

2. All members of the family are inhabitants of the Commonwealth, not residents as stated in the Court's Findings, II, 1 through 4. The Court's refuses to recognize this fact enumerated in the Parent's proposed findings. As the Parents indicated in exhibit 7, the Family does not have an address, and therefor are not residents of Waltham. Exhibits 4a and 4b (Real Estate deeds) are proof of property ownership and not proof of residence.

3. The Court's Findings at II-6 concludes information about the jurisdiction of the Waltham School Committee. There has been no evidence presented

regarding the jurisdiction of the Waltham School Committee so no such statement of fact is possible.

4. The Court's Findings at II-13 that the parents failed to respond to summonses, is contradicted by its footnote. What is more relevant to the matter at hand is the evidence that Mr, Doyle testified that he had obtained service and was then confronted with evidence that no service was obtained. These facts in the transcript, require an inference on the part of the Court that this witness is unreliable, an inference the Court fails to make.

5. The Parents object to the mischaracterization of Mr. Doyle's conversation with our council as a threat. See Court's finding at II-14 and 17. Particularly when our council was prohibited from being present in court during all proceedings and has been unable to respond to these allegations.

6. By the incorrect sequential order of facts 13 and 14 the Court's Findings imply that exhibit 7 was in response to a summons for the Criminal Complaint. It was not. Exhibit 7 was served upon Mr. Doyle and the Court in response to show-cause hearing which the Parents were not required to attend.

7. In Court Findings II- 21, the Court has evidenced prejudice against parents by terming a serious attempt to explain the Parents' perspective on education (exhibit 15) as "a simplistic and facetious *apologia*".

8. In Court Findings II-22, the Court has evidenced prejudice in favor of the Petitioner by deeming fraudulent attempts on the part of the attorney for the school department to deprive parents of their natural

rights (exhibit 41) as "helpful".

9. In Court's Findings II-29. The court adopts Dr. Rosenberg's facetious colloquialism, "interest inventory",) in describing exhibits 24 and 25. The Court makes no attempt to understand the progress report as the parents have presented it or to analyze the education provided to the children as it later does with exhibit 22 in Court's Findings II-31. If the short hand of the check marks were substituted at each subject by the words of their legend, the reports would read for example, "The child has been interested in Vocabulary and has performed activities toward obtaining an understanding of recognizing that words have multiple meanings, identifying and using new words in a variety of contexts, recognizing antonyms and synonyms, and completing simple analogies". Such is for one subject at one of Waltham's grade levels. Such a detailed progress report in words would have greatly exceeded the 20+ pages of each of the current reports and required prohibitive effort on the part of the Parents to type or write said words.

10. In Court's Findings II-34 "Although the school committee rules require compliance with the guidelines set forth in *Charles* it is flexible in the application..."conflicts with the testimony presented by Dr. Rosenberg. The Waltham School Committee allows for no other evaluation in evidence than tests and portfolios. While they say they permit progress reports, said progress report is defined to include work samples. Work samples are portfolio material. The Waltham School Committee is apparently not flexible enough to accept the exigencies of the Parents' educational philosophy.

11. The only finding of the Parents' included in the Court's Finding is that the Respondents are in fact the parents of the above captioned children.

IX. The Best Interests of the Commonwealth

"The end of the institution, maintenance and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquillity their natural rights, and the blessing of life;..." Preamble, A Constitution or Form of Government for The Commonwealth of Massachusetts.

1. It is clear from a reading of transcripts and documents in evidence (the affidavit, the Partial motion to dismiss, the filing of the 51A, etc.) that the purpose of this proceeding, *inter alia*, has been to threaten, harass, intimidate and coerce the family to surrender their rights enumerated in the Constitution of the Commonwealth of Massachusetts. Compare this with the purpose of Government stated in the Constitution, *supra*.

2. The decision of the Court has not been made with law and the Constitution in mind. Instead the Court mandates further violations of the Constitution with the threat that "temporary custody of the Children will be transferred to the Department" and in spite of "the fact that the Children did not appear to be at serious risk..." (Footnote 1, page 2)

3. Indeed the Court sets forth her true reason for finding the children in need of care and protection in the margin: "The case law, ... requires such a finding for the court to retain jurisdiction of the case." page 14, footnote 9.

X. Religious Convictions of the Parents

1. The Court's Findings IV-2 state "that Mother and Father are unlikely to comply with the guidelines set forth in *Charles*, for the foreseeable future." It is not clear what facts this is based upon, but perhaps it is for the reasons *et seq*.

2. The parents have a deeply religious conviction to uphold in the rules and regulations contained in the Constitution of the Commonwealth of Massachusetts, and the law. For reasons set forth in their "PROPOSED FINDINGS OF FACT AND REQUESTS FOR RULINGS OF LAW" the Parents find that the actions of Waltham are violative of the Constitution.

3. The Parents also have a deeply religious conviction that it is wrong for children to be subjected to testing, grading and assessment by "education experts". This conviction is evidenced in several exhibits, most notably in the court investigator's report, exhibit 28, at (a) "Family's educational philosophy" and exhibit 27.

4. Court's Findings II-37 is not in evidence and certainly will violate the integrity of this Family's form of education.

5. Court's Findings II-42 is not in evidence with respect to "learner-led " approach and will violate the integrity of this Family's form of education.

6. Court's findings III-17 do not take into account the Family's form of education.

7. The respondents find that the Court's order violates

both of the religious convictions, *supra*, unnecessarily and unlawfully. We are now put in an untenable position of violating our convictions, or risking harm to the children caused by removal to the custody of DSS or risking contempt charges.

XI. Prayer for Relief

Because the Court's duty first and foremost is to uphold the law and the Constitution, the Respondents pray that this decision be vacated. If the Court does not vacate this decision, the Parents pray that the Court suspend the orders contained in Court's Finding pending a new trial.

September 14, 1998, by our hands,

s/George Greeley: Bryant s/Kim Elizabeth: Bryant